



DAC

Attorney Docket No. 005231.03-4000

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicant(s): John S. Yates, Jr., et al.

Serial No.: 09/385,394

Art Unit: 2183

Filed: August 30, 1999

Examiner: Richard Ellis

Title: COMPUTER WITH TWO EXECUTION MODES

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Respectfully submitted,

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Dated: July 11, 2003

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Petitioner: John S. Yates, Jr., et al.
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PETITION FROM DECISION OF TECHNOLOGY CENTER DIRECTOR

Petitioner seeks relief from errors in a “Decision on Petition Invoking Supervisory Authority under 37 C.F.R. § 1.181” of May 22, 2003 (the “TCD’s Decision”), rendered on a Petition filed April 10, 2003¹ (as supplemented May 2, 2003, the “Underlying Petition”). The Underlying Petition sought to reopen prosecution, because the Office Action of October 1, 2002 (the “Second Action”) was prematurely made final.

The following questions are presented for review:

1. Did the Technology Center Director err in asserting that the issues presented in the Underlying Petition were directed to appealable subject matter, when precedent of both the Board of Appeals and of the Director unambiguously holds that such issues are petitionable and not appealable?
2. Can the Second Action properly be final, when the examiner himself admits that the Second Action is silent on essential elements of his *prima facie* case, and otherwise violates non-discretionary requirements?

The Underlying Petition was directed to omissions in the two Office Actions. Because of these omissions, no “clear issue” was developed for appeal and final rejection was premature

¹ The Underlying Petition was timely filed within two months from the examiner’s February 10 denial of a request for reconsideration of finality. The statement of untimeliness in TCD’s Decision is incorrect.

pursuant to MPEP § 706.07. The TCD's Decision improperly redefined the issues presented, and failed to adjudicate the Underlying Petition.

Further, these omissions are representative of several violations of non-discretionary requirements. It is well established that when an agency acts contrary to its own manual, the resulting action is "illegal and of no effect." *Vitarelli v. Seaton*, 359 U.S. 535, 545 (1959) (emphasis added); *Certain Former CSA Employees v. Dept. of Health and Human Services*, 762 F.2d 978, 984 (Fed. Cir. 1985) (action in violation of agency's own regulation is "illegal and of no effect," emphasis added). Here, there can be no dispute that several of the examiner's actions and omissions were "illegal." The PTO has a duty to prevent and remedy illegal actions of an examiner. The TCD's Decision violated that duty.

Finally, the jurisdictional analysis of the TCD's Decision is erroneous.

I. The Issues Presented Are Petitionable

Page 4 of the TCD's Decision asserts that many of the issues raised in the Underlying Petition are "deemed to be appealable matters and therefore are not petitionable to the Commissioner of Patents and Trademarks." The TCD's Decision cites no controlling authority,² and all authority is directly contrary.

The decisions of the Board of Appeals have been uniform since 1952: finality of an Office Action is not appealable. *Ex parte Englander*, <http://www.uspto.gov/web/offices/dcom/bpai/decisions/fd992094.pdf> at 4 (Bd. Pat. App. & Interf. 2001) ("[W]e note that the issue of whether the final rejection was improper relates to a petitionable matter and not to an appealable matter."); *In re Fine*, 217 USPQ 76, 79 (Bd. Pat. App. & Interf. 1981) ("We are likewise not concerned with the allegedly premature nature of the final rejection... This is an administrative matter subject to petition, not a substantive matter within our jurisdiction."); *Ex parte Ligett*, 121 USPQ 324, 326 (Bd. Pat. App. & Interf. 1958) ("The alleged prematurity of the final rejection is not an issue to be decided by us..."). 37 C.F.R. § 1.181(a)(1) left the TC Director no discretion to decline review of an action (in this case, the act of making the Second Action final) that is not appealable.

² The TC Director's Decision quotes MPEP § 1201; however, the MPEP is not promulgated pursuant to 5 U.S.C. § 553 and therefore cannot have "force of law" to bind an applicant. The MPEP only binds the PTO. *Ethicon Inc. v. Quigg*, 849 F.2d 1422, 1425, 7 USPQ2d 1152, 1154 (Fed. Cir. 1988) (MPEP "does not have the force of law" but does "describe procedures on which the public can rely.")

Directly contrary to the TCD's Decision, precedent of the Commissioner (now Director) of Patents and Trademarks directs that the issues presented in the Underlying Petition are properly considered by petition, *In re Oku*, 25 USPQ2d 1155, 1156-57 (Comm'r Pat. and TM 1992):

However, proper petitions to exercise the Commissioner's supervisory authority have the salutary effect of establishing uniform operating procedures within the Patent and Trademark Office (PTO) and of conserving judicial resources until cases have been handled in accordance with the rules.

Whether or not the Board made a new ground of rejection can be an issue reviewable on appeal. Petitioner correctly notes, however, that the existence of a new ground of rejection is an ancillary question on judicial review. The designation of a new ground of rejection, while involving a consideration of the merits, also involves the important question of whether the Board followed PTO regulations established by the Commissioner. In appropriate circumstances the Commissioner may exercise his supervisory authority on petition to reopen prosecution. As stated in *In re Weiss*, 160 USPQ at 424 :

...

A decision to reopen prosecution notwithstanding an adverse decision by the Board is a question solely within the discretion of the Commissioner and is in no way a review of a merits decision by the Board.

The issues presented in the Underlying Petition are more clearly petitionable than those in *Oku*. *Oku* itself concedes that the issue there could have been appealed; here, the question of finality certainly cannot. Unlike *Oku*, the finality issues raised in the Underlying Petition have nothing to do with the "merits" of the invention vis-à-vis the prior art – the petitioned issues relate to the examiner's complete silence on essential elements of the merits. Like *Oku*, the petitioned issues go directly and solely to "the important question of whether the [examiner] followed PTO regulations established by the [Director]." As in *Oku*, the remedy sought is a reopening of prosecution. Such questions are reviewable solely by petition.

As will be shown below, the examiner plainly writes that he refuses to act within the discretion granted by the PTO. The only "difference of opinion" presented in this petition is between the examiner and the MPEP. These "differences of opinion" are appropriate for supervisory relief.

The TC Director erred in refusing to adjudicate the issues presented in the Underlying Petition.

II. Standard for Finality of an Office Action

The basic requirement for final rejection is “develop[ment of] a clear issue for appeal.” MPEP § 706.07. The Board of Patent Appeals explains what it means to “develop a clear issue for appeal,” in *Ex parte Schricker*, 56 USPQ2d 1723, 1725 (BPAI 2000):

The examiner has left applicant and the board to guess as to the basis of the rejection... We are not good at guessing; hence, we decline to guess. ... [T]he examiner has failed to develop the record sufficiently to permit applicant to address the issues and for us to make a cogent ruling on any difference of opinion between applicant and the examiner.

If the Board will not review written Office Actions that leave an applicant or the Board to “guess,” and do not allow a “difference of opinion” to be identified, then such an Office Action is insufficient to support an appeal, and finality is premature.

Final rejection practice is the means by which the PTO “deal[s] justly by both the applicant and the public.” MPEP § 706.07. The Federal Circuit has further explained the fairness grounds that underlie examination and final rejection:

The process of patent examination is an interactive one. The examiner cannot sit mum, leaving the applicant to shoot arrows into the dark hoping to somehow hit a **secret objection** harbored by the examiner. The ‘*prima facie* case’ notion ... seemingly was intended to leave no doubt among examiners that they must state **clearly and specifically** any objections (the *prima facie* case) to patentability, and give the applicant **fair opportunity to meet those objections** with evidence and argument. To that extent the concept serves to level the playing field and reduces the likelihood of administrative arbitrariness.

In re Oetiker, 977 F.2d 1443, 1449, 24 USPQ2d 1443, 1447 (Fed. Cir. 1992) (Plager, J., concurring, citations omitted, bold added).

As will be shown below, the two Office Actions were so incomplete that Petitioner’s best attempts to “guess” at the examiner’s position were incorrect. The omissions in the Office Actions clearly violated MPEP requirements. Such deviations are “illegal,” *Vitarelli*, 359 U.S. at 545, and prevent finality. MPEP § 706.07.

III. All Obviousness Rejections are Incomplete, and Cannot be Made Final

By the examiner’s own repeated written admissions, neither Office Action reflects examination of any claim for obviousness. An unexamined claim cannot be finally rejected.

The Federal Circuit and the PTO have worked together to define the elements of *prima facie* rejections. For example, Chapter 2100 of the MPEP quotes *In re Oetiker*, 977 F.2d 1443, 1445-46, 24 USPQ2d 1443, 1445-46 (Fed. Cir. 1995) as follows, MPEP § 2107.02:

The examiner bears the initial burden, on review of the prior art or on any other ground, of presenting a *prima facie* case of unpatentability. ... If examination at the initial stage does not produce a *prima facie* case of unpatentability, then without more the applicant is entitled to grant of the patent."

In its original, *Oetiker* continues:

We think that the PTO is correct in treating the concept of the *prima facie* case as of broad applicability, for it places the initial burden on the examiner, the appropriate procedure whatever the technological class of invention.

MPEP § 2142 makes clear that the initial step in any obviousness inquiry lies with the examiner (citations omitted):

The legal concept of *prima facie* obviousness is a procedural tool of examination which applies broadly to all arts. It allocates who has the burden of going forward with production of evidence in each step of the examination process. The examiner bears the initial burden of factually supporting any *prima facie* conclusion of obviousness.

In re Rouffet, 149 F.3d 1350, 1355, 47 USPQ2d 1453, 1459 ("To reject claims in an application under section 103, an examiner must show an un rebutted *prima facie* case of obviousness.").

MPEP § 2142, *Oetiker* and *Rouffet* make clear that the first and mandatory step is the examiner's. A showing of each element of *prima facie* obviousness is not discretionary.

MPEP §§ 2143 states the minimum requirements that must be met before any *prima facie* § 103(a) rejection can even exist, let alone mature into a final rejection or shift the burden to an applicant to respond (nearly identical statements are reiterated in §§ 2142 and 706.02(j)):

2143 Basic Requirements of a *Prima Facie* Case of Obviousness

To establish a *prima facie* case of obviousness, three basic criteria must be met. ... Second, there must be a reasonable expectation of success. ... The teaching or suggestion to make the claimed combination and the reasonable expectation of success must both be found in the prior art, not in applicant's disclosure. *In re Vaeck*, 947 F.2d 488, 20 USPQ2d 1438 (Fed. Cir. 1991).

The Director imposed this procedural requirement for "reasonable expectation of success" in order to ensure that an examiner's technological analysis will be correct and complete, and that an applicant will have a fair disclosure of the examiner's theory of unpatentability. The MPEP and *In re Rouffet* are clear, that without a showing of "reasonable expectation of success," no obviousness rejection exists at all. A non-existent rejection cannot mature into a final rejection.

Here, the examiner has written repeatedly that he refuses to consider "reasonable expectation of success."

In one Advisory Action (paper 14 ¶ 4), the examiner states that he considers himself exempt from this requirement of the MPEP, because he is not examining a chemical process.

This is examiner error—MPEP § 2142 clearly states that the *prima facie* requirements apply uniformly in all arts.

In a telephonic interview in early March 2003, the examiner conceded that he did not even realize that there was any requirement for showing of “reasonable expectation of success” until that very day. The examiner was unable to identify any such showing in any Office Action, and conceded that none exists.

In paper no. 16, ¶ 4, the examiner shifts the burden to Petitioner to produce an affidavit challenging “reasonable expectation of success” even when the Office Actions are silent. This is examiner error. MPEP § 2142 is absolutely clear that no burden shifts until the examiner makes the necessary showing of all three elements of *prima facie* obviousness.³ The examiner’s view asks an applicant to speculate as to all possible sources of disagreement, including all “hidden objections” that an examiner has never articulated, and prepare an affidavit in respond to all of them. The examiner’s view is impractical, is directly contrary to *Oetiker* and the MPEP, and is beyond his discretion.

In paper no. 19 ¶ 11, the examiner again states that he has no obligation to make any showing of “reasonable expectation of success,” because a patent is presumed to be enabling for any speculative extension of a reference that an examiner can invent. This is examiner error, and beyond an examiner’s discretion.

The Second Action presents no appealable “difference of opinion” between Petitioner and examiner, because the examiner affirmatively refuses to state his opinion. The examiner concedes that no showing was made in either Office Action. The only disagreement that can be discerned from the record that existed as of the Second Action is between the examiner and PTO management: whether an examiner is bound by the instructions in the MPEP, or is free to ignore them.

It is undisputed that the Second Action fails to even mention “reasonable expectation of success,” and is therefore “illegal and of no effect” as to obviousness. A non-existent rejection cannot mature into a final rejection.

³ “The burden to rebut a rejection of obviousness does not arise until a *prima facie* case has been established.” *In re Rijckaert*, 9 F.3d 1531, 1532, 28 USPQ2d 1955, 1957 (Fed. Cir. 1993).

IV. Claim 104 has Not Been Searched or Examined – Any Final Disposition is Premature

The Second Action purports to reject claim 104. In Advisory Actions, the examiner plainly admits that the two Office Actions applied an impermissible claim scope. Thus, by the examiner's own admission, this claim has never been examined or searched at its correct scope. Any final disposition – final rejection or allowance – is premature.

Claim 104 recites that computer hardware enforces a requirement that two memory regions be “necessarily disjoint.” The Second Action (paper no. 8) rejects claim 104, asserting that the claim term “necessarily disjoint” is met by its direct opposite, two memory regions that “may overlap.” (Paper no. 8, ¶¶ 16, 31(F)).

This conundrum is elaborated in an Advisory Action (paper no 16). Though paper no. 16 does not explain precisely what “necessarily” is thought to mean, from context, it is clear that it is being given a meaning that introduces exceptions, to mean “possibly” or “not necessarily.” In a telephone interview contemporaneous with paper no. 16, the examiner stated that the word “necessarily” introduced some possibility of exceptions into the claim.⁴

After a further exchange (not given paper numbers), a further Advisory Action (paper no. 17) states as follows:

... the phrase “indicator elements enforcing a requirement that the memory regions be necessarily disjoint” in the claim language ... would result in the claim stating that the memory regions must be disjoint as argued by Applicant. The examiner now admits that the claim must be given a different construction than has ever been applied during any previous search. The PTO can neither reject or allow a claim that has never been searched under its proper construction. Any final disposition is premature.

A subsequent paper explains the underlying problem: the examiner states that he rejects claims “based upon their broadest interpretation.” Paper 19 ¶ 16. This is examiner error. MPEP § 2111 states that “During patent examination, the pending claims must be ‘given their broadest reasonable interpretation consistent with the specification.” MPEP § 2111.01 elaborates that when a claim uses a term of art, “the words of a claim must be given their plain meaning. In other words, they must be read as they would be interpreted by those of ordinary skill in the art.”

⁴ This was the first time that the examiner had “developed the record sufficiently to permit applicant to address the issues and for [the Board] to make a cogent ruling on any difference of opinion.” *Schricker*, 56 USPQ2d at 1725. However, an Advisory Action is too late to support a final rejection.

The claim has never been examined because the examiner violated “must” requirements MPEP § 2111 and § 2111.01. The PTO should not reward the Examiner for that error with a disposal count.⁵ Withdrawal of final rejection is not only legally required; it is the only way to realize the “fairness” and “just dealing” concerns of MPEP § 706.07. When it comes clear that prosecution has been obstructed by the examiner’s violation of PTO requirements, the examiner should bear the cost of extending prosecution forward on a reasonable basis, not an applicant.

V. Fair Opportunity to Respond

Page 5 of the TCD’s Decision purports to consider whether Petitioner had a fair opportunity to respond, as required by *In re Oetiker* (see page 4 of this paper).

The rules for *prima facie* examination and for final rejection are structured to ensure that an applicant receives a complete and cogent statement of a rejection early enough to allow a proper response, and if an Office Action leaves an Applicant to “guess” at the basis for a rejection, the examiner has failed to “develop an issue for appeal,” *Schricker*, 56 USPQ2d at 1725, and final rejection is premature. MPEP § 706.87. PTO rules do not provide for making a first attempt at a *prima facie* showing in an Advisory Action, because an applicant has no opportunity to respond to grounds for rejection newly-stated in an Advisory Action.

The Underlying Petition was directed to (a) things that were not done in the Office Actions, (b) things that were done too late, and (c) non-discretionary tasks that the examiner refuses to begin. The TCD’s Decision entirely avoids discussing any of these issues, and instead responds to some imagined complaint “about the extensive communications that occurred after the final rejection.” TCD’s Decision, at p. 5, l. 9. An agency adjudicator “shall proceed to conclude a matter presented to it,” and has no discretion to redefine the issues. 5 U.S.C. § 555(b). The TCD’s Decisions errs in avoiding consideration of the petitioned defects in the Second Action, and untimeliness of first statements of the examiner’s position in Advisory Actions.

⁵ “The Commissioner has an obligation to ensure that all parts of the [PTO] conform to official policy of the agency, including official interpretations of the agency’s organic legislation.” *In re Alappat*, 33 F.3d 1526, 1580, 31 USPQ2d 1545, 1588 (Fed. Cir. 1994) (*en banc*) (Plager, J., concurring). Chapter 2100 of the MPEP is the PTO’s official interpretation of the agency’s organic statute as it is to be applied during initial examination, and the Commissioner (now Director) has a duty to enforce that policy during initial examination.

The TCD's Decision states that the record closes with the Second Action, thus confirming the inadequacy of the Second Action. If appeal were to be taken from the Second Action, the Board would have no access to the examiner's explanation of how the claims are construed, nor how he believes the reference operates. The Board will not "guess" at such issues. *Schricker*, 56 USPQ2d at 1725. If an appeal were taken on the record through the Second Action, Board precedent establishes that the Board will refuse to adjudicate.⁶ The Advisory Actions make clear that the Office Actions were inadequate to apprise the Board of the bases for rejection.

Final rejection is premature.

VI. Additional Errors in the TCD's Decision

The TCD's Decision is not the product of reasoned agency decision-making, and cannot be sustained.

Incorrect statements of law are *per se* an "abuse of discretion," *Oakley Inc. v. Sunglass Hut, Inc.*, 316 F.3d 1331, 1339, 65 USPQ2d 1321, 1325 (Fed. Cir. 2003), and agency decisions based thereon cannot be sustained. 5 U.S.C. § 706(2)(A) (agency decision must be set aside when premised on "abuse of discretion"). As one example, the TCD's Decision (p. 3 l. 24) questions the use of "functional" language. This view of the law has been invalid for at least 30 years, *In re Echerd*, 471 F.2d 632, 635, 176 USPQ 321, 322 (CCPA 1973), and PTO policy forbids any de-weighting of functional language. MPEP § 2173.05(g) ("A functional limitation must be evaluated and considered, just like any other limitation of the claim...").

An agency decision is due *de novo* review – that is, it is due no deference whatsoever – when agency fact-finding procedures are inadequate. *Citizens to Preserve Overton Park Inc. v. Volpe*, 401 U.S. 402, 415 (1971).

⁶ The Board has repeatedly refused to adjudicate appeals where the examiner has failed to set out an element of a *prima facie* rejection, as here. *Ex parte Rozzi*, 63 USPQ2d 1196, 1200 (Bd. Pat. App. & Interf. 2002) ("The examiner makes no cogent attempt to read Hill onto claim 1 ... we decline, in the first instance, to study Hill and make a determination of whether all the limitations of claim 1 are explicitly or inherently described by Hill."); *Ex parte Gambogi*, 62 USPQ 209, 1212 (Bd. Pat. App. & Interf. 2001) (vacating and remanding because "the examiner has not analyzed each reference in any meaningful detail"); *Ex parte Zambrano*, 58 USPQ2d 1309, 1312 (Bd. Pat. App. & Interf. 2000) (vacating and remanding because the examiner failed to develop the issues sufficiently to permit meaningful appellate review); *Ex parte Braeken*, 54 USPQ2d 1110, 1113 (Bd. Pat. App. & Interf. 1999) (remanding because examiner failed to explain an element of *prima facie* case: "the appeal is not ripe for decision").

As one example of inadequate fact-finding, the TCD's Decision states that "Applicants did not discuss the limitations of any dependent claims." In each of Petitioner's papers, at least one limitation of each relevant independent claim was discussed. Each dependent claim incorporates the limitations of all claims from which it depends. Therefore, a limitation of each relevant dependent claim was necessarily discussed.

For a second example, the TCD's Decision states that "applicant's response did not appear to fully comply with 37 CFR § 1.111 (b) in addressing every ground of objection and rejection." The TCD's Decision does not – and cannot – identify any ground of objection or rejection that is not addressed in Petitioner's papers. Every ground raised in either Office Action is addressed by an amendment or by Remarks, and the "patentable novelty" of at least one limitation of each new claim is "pointed out."

An agency decision can only be affirmed when it is based on "consideration of the relevant factors." *Motor Vehicle Manufacturers' Association v. State Farm Mutual Insurance*, 463 U.S. 29, 43 (1983).

In addition to the several failures to consider relevant factors discussed above, the TCD's Decision states that certain claim limitations of independent claims are not discussed in Petitioner's papers. Page 3, line 21-23. The TC Director's observation diverts attention from any relevant factor. In a § 102 context, an applicant's obligations are fully met by showing that a single claim limitation distinguishes the prior art. At least one limitation of each relevant independent claim is discussed in Petitioner's papers. The fact that some claims recite further limitations is entirely irrelevant.

As another example of failure to "consider relevant factors," the final paragraph of page 3 observes that claim 22 was amended, but the observation obscures the issue presented. The particular claim limitation of claim 22 discussed in the Underlying Petition had never been amended, and never compared in either Office Action to any feature of the reference. The factual observations in the TCD's Decision regarding the prosecution history of claim 22 are entirely irrelevant, and prevent consideration of the "matter presented," in violation of 5 U.S.C. § 555(b).

Almost all issues presented in the Underlying Petition arise under MPEP § 706.07, the "clear issue developed for appeal" prong of the test for final rejection. The TCD's Decision never considers the issues presented, but instead relies solely on MPEP § 706.07(a), the "amendment necessitated new grounds of rejection" prong. The TCD's Decision identifies no

"issue developed for appeal" in the Final Office Action. An agency adjudicator may not redefine the basis for a petition and thereby fail to adjudicate the "matter presented." 5 U.S.C. § 555(b).

The TCD's Decision constitutes "arbitrary and capricious" adjudication and must be reversed.

VII. Conclusion

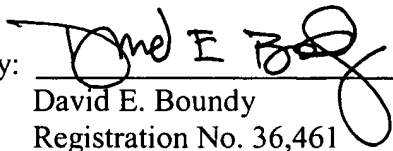
Petitioner requests that the TCD's Decision be reversed, and that finality of the Office Action of October 1, 2002 be withdrawn. With finality withdrawn, the Response to Office Action filed on December 2, 2002 may be entered as of right to toll the shortened statutory period. The Petitions for Extension of Time, Notice of Appeal and Request for Continued Examination filed subsequent thereto thus become nugatory, and any fees associated therewith may be refunded. The Response Accompanying RCE filed on June 30, 2003 may be entered as a supplementary response.

This Petition occasions no fee. Kindly charge any additional fee, or credit any surplus, to 50-0675, Order No. 005231.03-4000.

Respectfully submitted,

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Dated: July 11, 2003

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